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IN THE

Supreme Court of the United States

October Term, 1963.

No. 261.

ESTATE OF WINFRED S. HURST, Deceased:

HARRY J. ALKER, JR.,

Petitioner.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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No. 261.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Orphans' Court of Montgomery County is not reported, but appears at R. 79a.* The per curiam opinion of the Supreme Court of Pennsylvania is not yet reported.

* Reference is made to the printed record filed in the Supreme Court of Pennsylvania, 9 copies of which have been filed by petitioner. The printed record includes 3 separate volumes: one captioned "Record", in which page numbers are followed with the letter "a"; one captioned "Supplemental Record", and one captioned "Brief of Appellees and Further Supplemental Record". Page numbers in the supplemental records are followed with the letter "b".

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on March 19, 1963, and this Court extended the time for filing petitioner's Petition for Certiorari to July 8, 1963. Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C., § 1257(3).

QUESTION PRESENTED.

Did the courts below unfairly determine (1) that a penalty for fraudulent evasion of federal estate taxes, incurred and paid by the estate of Winfred S. Hurst, should be apportioned solely against the petitioner; (2) that to implement apportionment, petitioner's undistributed legacy under the will of Winfred S. Hurst should be turned over to the administrators of the estate?

STATEMENT.

Winfred S. Hurst died testate on November 7, 1949. Petitioner, Harry J. Alker, Jr., was appointed his executor, and also named as one of eight residuary legatees entitled to share equally in 1,300 shares of Dublin Hosiery Mills, Inc.

Approximately four years later, petitioner, as executor, filed a first and final account to which several legatees excepted and, on June 22, 1955, the Orphans' Court of Montgomery County rendered an adjudication surcharging petitioner for $131,044.79 (R. 115b, 120b-123b). The court concluded that petitioner was "* * * unfit to represent and protect the interests of the beneficiaries in the settlement of this estate * * *", and directed his removal as executor (R. 123b). (A supplemental adjudication of December, 1955 (R. 23a-31a) approved an agreement of the parties

eliminating certain surcharges on condition that petitioner fulfill several stated conditions, but those conditions were never fully met.)

In 1953, petitioner had received a notice of federal estate tax deficiency. On March 25, 1954, he had filed a petition in the United States Tax Court for a redetermination of the tax. Accordingly, the Orphans' Court was aware of the estate tax difficulties, and specifically made its adjudication "* * * subject to the payment of * * * additional Federal Estate Tax which may properly be found to be due and owing * * *" (R. 118b). The supplemental adjudication of December 8, 1955, was also made "* * * subject to the payment of such additional Federal Estate Taxes * * * as may properly be found to be due * * *" (R. 29a).

In March, 1956, petitioner was indicted for submitting a false and fraudulent return in the Hurst estate. Specifically, he was charged with having willfully failed to include $35,000 in cash belonging to the estate. On April 8, 1957, he was convicted; and on May 13, 1958, his conviction was affirmed by the United States Court of Appeals for the Third Circuit. **United States v. Alker**, 255 F. 2d 851. On October 13, 1958, this Court denied certiorari.

From the time of the original and supplemental adjudications in 1955 until this Court's denial of certiorari in the criminal case in 1958, the civil estate tax proceedings in the Tax Court had continued. Petitioner, after his removal as executor, withdrew from the Tax Court proceeding, and the present administrators d.b.n.c.t.a. were substituted. On that same day, May 21, 1956, petitioner withdrew as counsel.

Thereafter, following petitioner's criminal conviction, on August 2, 1957, the United States increased the deficiency asserted against the estate to $31,029, and asserted a fraud penalty of $71,876.

Only after petitioner had sought and been refused review of his criminal conviction in this Court, were the

administrators able to conclude the Tax Court proceeding. After protracted negotiation, on January 21, 1959, the administrators were successful in persuading the Government that certain assets of the estate had been over-valued, and that certain challenged deductions were properly allowable, and in this way they had off-set the unreported $35,000 (R. 37a-44a). Hence, the Government agreed that no deficiency was due; but it continued to insist upon the payment of a civil penalty for fraud. In the end, the Government agreed to reduce the amount of the penalty from the $71,876.10 which it originally claimed, to $28,180.78 (R. 113b).

On March 20, 1959, the parties' stipulation for payment of the latter amount was embodied in a decree of the United States Tax Court (R. 114b). The $28,180.78 fraud penalty was paid from the administrators' cash account, and from contributions from all residuary legatees except petitioner (R. 44a).

Several months later, petitioner's criminal conviction was set aside, and a new trial granted, because it appeared that several of the jurors had known, when they rendered their verdict, that petitioner had previously been convicted for criminal evasion of federal income tax. **United States v. Alker**, 180 F. Supp. 661 (1959). Ultimately because petitioner was old and ill, and because he had already been imprisoned, the United States Attorney successfully moved to quash the indictment.

The determination of which petitioner now seeks review was made by the Orphans' Court on September 1, 1961 (R. 79a) and was affirmed, per curiam, by the Supreme Court of Pennsylvania. The court, on petition of the administrators (R. 4a), after petitioner had intervened (R. 24b-25b) and been heard, found (R. 84a) that "* * * Mr. Alker's actions have been the sole substantial cause of a tax penalty of more than $28,000. * * *," and entered a decree (R. 88a) apportioning the penalty solely against his distributive share of the residuary estate.

Petitioner's one-eighth interest in the testator's 1,300 shares of Dublin Hosiery stock had remained undistributed, pursuant to specific provisions in the supplemental adjudication of December 8, 1955 (R. 23a, 25a-27a, 29a). Then, the Orphans' Court had determined that distribution to him would have to await its approval of a final schedule of distribution, subsequent to the final settlement and payment of federal estate tax. In 1955, the shares were held by escrow agents who, thereafter, surrendered the original certificates to the issuing corporation, and received therefor eight new certificates, each for 162½ shares, in the names, respectively, of the eight residuary legatees. Certificate No. 22, drawn in the name of petitioner, was endorsed in blank (R. 35a) and retained by the escrow agents until 1956, when all of the assets of the estate were turned over to the newly appointed administrators d.b.n.c.t.a. The certificate was never delivered to petitioner.

To implement its apportionment decree, the court below directed the liquidating trustees of Dublin Hosiery to turn over to the administrators the liquidation dividends (approximately $9,600) representing petitioner's undistributed legacy (R. 88a).[1]

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1. The liquidating trustees resisted the administrators' claim simply because petitioner and the United States had made prior claims to the liquidation dividends, the latter as a tax lien creditor.

ARGUMENT.

Petitioner is not urging that he was denied his procedural rights in the 1955 adjudications (surcharging him for $131,000), or in the course of the criminal proceedings. He asserts that he was unfairly treated only with respect to the apportionment decree of 1961, and even this complaint is not related directly to the apportionment proceeding. In that proceeding, he had every opportunity to present his case.

The real gist of his constitutional argument, stripped of its repetition and its contrived, conclusory statements, is that the apportionment decree was unfair **because** the Tax Court proceeding, which resulted in the imposition of the penalty for fraud, upon the **estate**, was consummated without the requisite notice to **him**. He refers (Petition, p. 7) to "The $28,180.78 proration judgment" as one against his "vested property"; and he claims to have suffered "lack of notice" because he was not a party to the **Tax Court** proceeding which resulted in the penalty apportioned against him in the decree below.[2]

1. Petitioner had no "vested property". His distributive share was held by the estate, pursuant to the 1955 ad-

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2. Petitioner also asserts (Petition, pp. 8, 15-20), that the initial imposition of the civil penalty by Internal Revenue was unauthorized by statute, but this assertion is patently erroneous. Putting aside the question whether this issue is properly raised in this case, Section 894(a) of the 1939 Internal Revenue Code, pertaining to estate tax, which petitioner has not cited to this Court, provides:

> "* * * False or Fraudulent Return.—For 50 per centum addition to the tax in case of a false or fraudulent return, see Section 3612(d)(2)".

Section 3612(d)(2) of the same code provides:

> "(d) Additions to Tax.—
>
> "(2) Fraud.—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount * * *".

judications, pending final distribution after settlement of all tax liability. The stock certificate representing his distributive share was never delivered to him. It was endorsed in blank and delivered, with his proxy, to the escrow agents who later turned it over to the administrators.

2. There was no improper "lack of notice" to petitioner in the Tax Court. He had no right to participate in that court; and he had every opportunity to challenge the decree of that court in the apportionment proceedings below. He did challenge it there, extensively, but he was unsuccessful.

a. Petitioner, after his removal as executor, was not a party to the proceeding in the Tax Court. The estate was the adverse party, and the estate, through its administrators, represented his interest and the interests of all the legatees in obtaining the lowest possible settlement with the United States.[3]

The settlement, which was embodied in a decree of the court pursuant to the parties' stipulation, was found by the court below to have been negotiated by the administrators "diligently" and "with great patience" (R. 83a, 82a).[4]

The Tax Court case began with the 1953 notice to petitioner, then acting as executor, of an estate tax deficiency. Petitioner himself petitioned for a redetermination of the tax. Thereafter, on May 21, 1956, following his indictment and his removal as executor, petitioner withdrew as a party

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3. Rule 6 of the Rules of Practice of the Tax Court provides:

> "A case in the Tax Court shall be brought by and in the name of the person against whom the Commissioner determined the deficiency (or liability, as the case may be), or by and in the full descriptive name of the fiduciary legally entitled to institute a case on behalf of such person."

And the Rules make no provision for intervention.

4. The negotiations which led to the settlement were fully explored in the court below (R. 37a-44a), and were the subject of lengthy cross-examination by petitioner's counsel (R. 50a-78a, 66b-103b).

from the Tax Court proceeding, in favor of the administrators, and he withdrew as counsel. The following year, he was convicted for filing a fraudulent return, but final settlement of the civil case between the estate and the Government had to await, in the Government's view, the Court of Appeals' affirmance of the conviction, and this Court's denial of the inevitable petition for certiorari. When this Court denied certiorari, the administrators were for the first time able to settle the civil suit.

Not only was petitioner fully aware of the civil suit; but in 1955, pursuant to the supplemental adjudication (R. 25a), he executed his power of attorney in favor of the administrators' counsel, authorizing them "* * * to appear for me and represent me before the Treasury Department, in connection with all matters involving Federal Taxes, Estate or Income, in which I, as Executor of the will of the said Winfred S. Hurst, am * * * a party * * *" (R. 32a). He authorized these attorneys "* * * to execute closing agreements, as fully as the undersigned might do if done by him personally", and he requested that "* * * all communications * * *" addressed to him "* * * be addressed to **them** * * *" (R. 32a, emphasis added). When the administrators were substituted as parties, and when he withdrew, he made no request for any notice of subsequent developments.

b. Nonetheless, in the court below, petitioner was given full opportunity to challenge the propriety of the proceeding in the Tax Court. He did attempt, without success, to show that the administrators had breached their duty to him when they agreed to pay the penalty, and hence that they should be surcharged; but he made no attempt to prove that he had filed a true return. The court below determined, on uncontradicted facts, that the administrators had acted fairly, and that petitioner's conduct was the sole cause for the imposition of the penalty. Accordingly, and following established equitable principles (**Mellon Estate**, 347 Pa. 520, 32 A. 2d 749, 1943), the court apportioned the penalty against him alone.

Clearly, the petitioner was not unfairly deprived of vested property, or of fair notice. His undistributed legacy was adjudged in 1955 to be contingent upon the final payment of taxes. He withdrew as a party and as counsel from the Tax Court proceedings, which left him no legitimate part in their ultimate disposition; and he was free to challenge and did challenge the fairness of the Tax Court ruling and of the apportionment, in the courts below. There was no lack of opportunity to be heard. His challenge was considered and correctly found to be totally lacking in merit.

CONCLUSION.

The judgment of the Orphans' Court, upheld by the Supreme Court of Pennsylvania, is a fair and sound determination. No question of general importance is presented by petitioner nor does the petition rest on any conflict of decisions. We urge, therefore, that the petition for certiorari be denied.

Respectfully submitted,

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